(1980); *Howlett v. Rose,* 496 U.S. 354, 375-76 (1990) (federal law controls immunity from section 1983 claims); *see also St. Louis v. Praprotnik,* 485 U.S. 112, 121-122 (1988); *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978) ("[f]ederal law makes governmental defendants that are not arms of the State, such as municipalities, liable for their constitutional violations" and therefore not immune from liability or suit for section 1983 claims.) This should have ended the state courts' inquiry, and the case should have been remanded to the trial court for a decision on the merits.

However, the appellate court opinion suggests its failure to look to federal law to determine section 1983 immunity was not merely a mistake, but reflected a decision, or choice to treat the plea to the jurisdiction as a 12(b)(6)-type motion for failure to state a claim and render a decision on the merits. At oral argument, one justice asked appellants' counsel if the court could treat the trial court's order granting the plea to the jurisdiction as the equivalent of a federal 12(b)(6) motion to dismiss for failure to state a claim. Although appellants' counsel stated the court could not, it appears the appellate court did just that. Every case cited by the appellate court in its opinion that involved application or interpretation of section 1983 also involved a decision on the merits; conversely, no state or federal authority was cited for its conclusion that Plaintiffs' pleaded section 1983 claims against the defendants HACEP and Armstrong, both "persons" under federal law, failed to invoke the state trial court's subject matter jurisdiction.

This was improper. State courts cannot apply state procedural rules in a discriminatory manner to discourage federally protected claims, even if the state courts perceive, for whatever reason, that such claims are lacking in merit.

See, e.g., Howlett, 496 U.S. at 379-81 ("[a] State may adopt neutral procedural rules to discourage frivolous litigation of all kinds, as long as those rules are not pre-empted by a valid federal law. A State may not, however, relieve congestion in its courts by declaring a whole category of federal claims to be frivolous. Until it has been proved that the claim has no merit, that judgment is not up to the States to make").

The Texas legislature and courts have not enacted, adopted, or recognized a rule that permits Texas courts to construe a plea to the jurisdiction -- which contests the trial court's subject matter jurisdiction over the case and is not a decision on the merits -- as the equivalent of a 12(b)(6) motion for failure to state a claim or similar motion that is a decision on the merits. The state courts' use of the plea to the jurisdiction in this way is not a recognized "neutral procedural rule to discourage frivolous litigation of all kinds," but a non-neutral rule that denied subject matter jurisdiction over Petitioners' federally-protected section 1983 claims, and a federally protected right to a decision on the merits pursuant to neutrally applied state procedural rules. *See Howlett,* 496 U.S. at 110 S.Ct. at 375-78 (noting "[o]n only three occasions have we found a valid excuse for a state court's refusal to entertain a federal cause of action [and] [e]ach of them involved a neutral rule of judicial administration" such as a statute permitting discretionary dismissal of federal and state claims on *forum non conveniens* grounds, territorial jurisdictional grounds, or where neither party was a resident of the forum state).

If the Texas state courts looked to state law to determine whether Defendants HACEP and Armstrong were immune from suit, then such action contravened the Supremacy Clause (Article 6, Clause 2) of the United States Constitution. *See*

Howlett, 496 U.S. at 375-78 (" . . . [t]o the extent that the Florida law of sovereign immunity reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law").

If, on the other hand, the Texas state courts construed the plea to the jurisdiction as a the equivalent of a 12(b)(6) motion to dismiss for failure to state a claim or other motion or plea allowing for a decision on the merits, then the court contravened the Supremacy Clause, and also violated procedural due process and so contravened the Fifth Amendment of the United States Constitution, as applied to state action through the Fourteenth Amendment of the United States Constitution. *See Howlett,* 496 U.S. at 372-75; *see also Matthews v. Eldridge,* 424 U.S. 319 (1976); *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428 (1982); *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 569-70 (1972).

Thus, the reasons for granting the Petition in this case are two-fold. First, this Court can make clear state courts must look to and apply federal substantive law as the rule of decision to determine immunity for section 1983 claims arising under federal law. Second, this Court can make clear state courts cannot fashion non-neutral, piecemeal state procedural rules to winnow out federally protected claims perceived, for whatever reason, to be lacking in merit.

For these reasons, the questions presented by this Petition are important. The Court should grant the Petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Supreme Court, U.S.
FILED
05-77 JUL 7 2005
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2004

ELSA GOMEZ AND JOSE RAMIRO GOMEZ, INDIVIDUALLY AND ON BEHALF OF JOSE GOMEZ AND SERGIO GOMEZ, MINOR CHILDREN,
Petitioners,
v.
~~HOUSING~~ AUTHORITY OF THE CITY OF EL PASO, TEXAS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Texas

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APPENDIX

APPENDIX A

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

No. 08-03-00224-CV
Appeal from 205th District Court
of El Paso County, Texas
(TC#2000-1111)

ELSA GOMEZ and JOSE RAMIRO GOMEZ,
Individually and on behalf of JOSE GOMEZ
and SERGIO GOMEZ, minor children,
Appellants,

v.

HOUSING AUTHORITY OF THE
CITY OF EL PASO, TEXAS,
Appellee.

JUDGMENT

The Court has considered this cause on the record and concludes there was no error in the judgment. We therefore affirm the judgment of the court below. We further order that Appellee recover from Appellants and its sureties, if any, *see* TEX.R. APP. P. 43.5, on the judgment and all costs, both in this Court and the court below for which let execution issue. This decision shall be certified below for observance.

IT IS SO ORDERED THIS 19TH DAY OF AUGUST, 2004.

/s/ Ann Crawford McClure
Justice, Court of Appeals for the
Eighth District of Texas

Before Panel No. 1

Larsen, McClure, and Chew, JJ.

COURT OF APPEALS

EIGHTH DISTRICT OF TEXAS

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of El Paso County, Texas

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ELSA GOMEZ and JOSE RAMIRO GOMEZ,

Individually and on behalf of JOSE GOMEZ

and SERGIO GOMEZ, minor children,

Appellants,

v.

HOUSING AUTHORITY OF

THE CITY OF EL PASO, TEXAS,

Appellee.

OPINION

We consider today the liability of the Housing Authority (HACEP) for federal civil rights violations arising from the sexual molestation of two children at a housing project. The trial court granted HACEP''s plea to the jurisdiction. Appellants Elsa Gomez and Jose Ramiro Gomez, individually and on behalf of their children, bring forward one issue on appeal. Finding ourselves in agreement with the court below, we affirm.

FACTUAL AND PROCEDURAL SUMMARY

The following allegations are taken from Appellants'' pleadings and evidence they submitted in response to the plea to the jurisdiction. On October 29, 1999, the Gomez family was living at the Machuca Housing Project in El Paso, Texas. HACEP had a policy prohibiting criminals from residing on housing authority premises in an effort to provide security and safety for the residents. Yet HACEP permitted Enrique Martinez to occupy the premises and, tragically, he molested the Gomez children at the Project playground. Appellants sued HACEP under the Texas Tort Claims Act. By their first amended petition, they added claims under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Lupe Armstrong, the apartment manager at the Project, was named as a defendant in the second amended petition.

Appellants alleged that HACEP and its employees, acting under color of law and in the course and scope of their employment, deprived them of rights secured by the Constitution and laws of the United States and the State of Texas. Specifically, Appellants contended that HACEP''s supervisory personnel demonstrated deliberate indifference to the children's constitutional rights to bodily integrity by permitting a convicted child molester to occupy the premises. They also pled that HACEP''s screening procedures were inadequate because they failed to remove occupants with known criminal histories and failed to supervise convicted criminals.

After filing special exceptions and an answer, HACEP filed its first amended plea to the jurisdiction in which it argued that a claim under section 1983 requires proof that a policy maker implemented an official policy which resulted in a violation of constitutional rights. It further argued that the lawsuit could not be predicated on a theory of *respondeat superior*. [fn1.] Consequently, HACEP

contended that the trial court lacked jurisdiction.

[fn1] Appellants' cause of action under the Texas Tort Claims Act is not at issue in this appeal. *See Renteria v. Housing Authority of the City of El Paso*, 96 S.W.3d 454 (Tex.App.--El Paso 2002, pet. denied)(affirming the granting of HACEP's plea to the jurisdiction on claims presented under the Texas Tort Claims Act and state common law in another molestation case). [end of footnote]

The evidence before the court included an affidavit from Enrique Martinez's wife, who was a resident at the Project. In March 1999, Mrs. Martinez asked Armstrong to add her husband to the lease. She was told that her husband could live in the unit for fifteen days pending an investigation. After the fifteen days had passed, Armstrong told Mrs. Martinez that her husband could not be added to the lease because of his criminal record, but he could visit provided he did not spend the night.

The trial court also considered Armstrong's deposition. As part of her job, Armstrong was expected to observe and enforce HACEP''s rules and regulations. She would report violations to her supervisor, Sam Silvas. Armstrong was not responsible for completing a criminal background check on every resident, as it was the responsibility of the eligibility department to do so. The Project had at least fifty children as residents and a playground was provided for them. There had been no complaints of child molestation while Armstrong was manager. She explained that when residents had visitors, they were to notify the office. However, HACEP did not screen the criminal records of visitors. The lease agreement provided that visitors could stay for fifteen days. Armstrong had never seen a situation where a non-tenant spouse stayed for more than two weeks. Armstrong admitted that Mrs. Martinez had come into the office requesting that her husband be added to the lease and that Mrs. Martinez was told her husband could visit for fifteen days until his background check was completed. She explained that if

Martinez had a criminal history, he would not be able to reside at the complex. Martinez''s criminal history was requested on March 23 and HACEP learned that he was ineligible on April 12. Armstrong was notified of his ineligibility, but not the reason why he was ineligible. Armstrong then notified Mrs. Martinez that her husband could not be added to the lease. Although HACEP rules permitted it, she denied saying that Martinez could visit and Mrs. Martinez never asked that he be allowed to do so. Armstrong only saw Martinez on the property one time and she told him he was prohibited from being there due to a restraining order his wife had obtained. Armstrong never saw him on the premises again. In October 1999, Martinez molested several children at the Project. Armstrong learned about it on the evening news.

PLEA TO THE JURISDICTION

In their sole point of error, Appellants contend they properly pled a cause of action under section 1983 for which immunity was unavailable.

Standard of Review

A plea to the jurisdiction is a dilatory plea by which a party contests the trial court's authority to determine the subject matter of the cause of action. *City of Saginaw v. Carter*, 996 S.W.2d 1, 2 (Tex.App.--Fort Worth 1999, pet.dism''d w.o.j.); *State v. Benavides*, 772 S.W.2d 271, 273 (Tex.App.--Corpus Christi 1989, writ denied). The plaintiff has the burden to allege facts that affirmatively demonstrate that the trial court has subject matter jurisdiction. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *City of Saginaw*, 996 S.W.2d at 2. Subject matter jurisdiction is a legal question which we review *de novo*. *City of Saginaw*, 996 S.W.2d at 2; *Texas Dept. of Health v. Doe*, 994 S.W.2d 890, 892 (Tex.App.--Austin 1999, pet. dism''d by agr.). We look solely to the allegations in the petition and accept

them as true. *See City of Saginaw*, 996 S.W.2d at 2-3. We do not examine the merits of the case. *See City of Saginaw*, 996 S.W.2d at 3. If the petition does not allege jurisdictional facts, the plaintiff's suit is subject to dismissal only when it is impossible to amend the pleadings to confer jurisdiction. *City of Saginaw*, 996 S.W.2d at 3; *see Texas Ass'n of Bus.*, 852 S.W.2d at 446; *Liberty Mut. Ins. Co. v. Sharp*, 874 S.W.2d 736, 739 (Tex.App.--Austin 1994, writ denied).

Sovereign Immunity

Sovereign immunity derives from the principle that the sovereign may not be sued in its courts without its consent. *Texas Workers' Comp. Comm'n v. Garcia*, 862 S.W.2d 61, 72 (Tex.App.--San Antonio 1993), *rev'd on other grounds*, 893 S.W.2d 504 (Tex. 1995). Unless waived, sovereign immunity protects the State from lawsuits for damages. *General Services Comm'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 594 (Tex. 2001). Sovereign immunity encompasses two principles: immunity from suit and immunity from liability. *Texas Natural Resource Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002). Immunity from suit bars a suit against the State unless immunity is waived by constitutional provision or legislative enactment. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003). Absent consent, the State retains immunity from suit even if its liability is undisputed. *Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 409 (Tex. 1997). A suit against a state agency is considered to be a suit against the State. *Lowe v. Texas Tech University*, 540 S.W.2d 297, 298 (Tex. 1976). Similarly, a suit against state officials in their official capacities is equivalent to a suit against the State. *Pickell v. Brooks*, 846 S.W.2d 421, 425 (Tex.App.--Austin 1992, writ denied). Consequently, sovereign immunity protects agencies that are derived from the state constitution and laws as well as state officials sued in their official capacities. *Lowe*, 540 S.W.2d at 298; *see Pickell*, 846 S.W.2d at 425.

Cause of Action Under Section 1983

Statutory Language

Title 42 U.S.C.A. section 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.

42 U.S.C.A. § 1983. A cause of action under this section involves two essential elements: (1) the conduct complained of was committed by a person acting under color of state law, and (2) the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or the laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420 (1981), *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327, 331-32, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). Unlike a claim asserted pursuant to state law, consent to suit is not required. *See Nueces County v. Hoff*, 105 S.W.3d 208, 210 (Tex.App.--Corpus Christi 2003, pet. filed).

"Persons"

Municipalities and other local government units are "persons" within the meaning of section 1983 and may be liable for a constitutional tort suffered as the result of an official policy, custom or pattern. *See Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2035-36, 56 L.Ed. 611 (1978). A municipality may be held liable for a single act or decision of a municipal official with final policy making authority. *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737, 109

S.Ct. 2702, 2724, 105 L.Ed.2d 598 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988)(plurality opinion); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 106 S.Ct. 1292, 1298, 89 L.Ed.2d 452 (1986). But it cannot be held liable solely because it employs a tortfeasor--or, in other words, a municipality cannot be held liable under section 1983 on a *respondeat superior* theory. *Monell*, at 691-92, 98 S.Ct. at 2036.

"*Acting Under Color of State Law*"

We must first determine whether the alleged unconstitutional conduct is directly attributable to HACEP through official action or imprimatur. In other words, liability arises if a deprivation of constitutional rights was inflicted pursuant to acts which the municipality has officially sanctioned or ordered. *Pembaur*, 475 U.S. at 480, 106 S.Ct. at 1298. This analysis requires a determination of (1) a policy maker; (2) an official policy; and (3) a violation of constitutional rights whose moving force was the policy or custom. These elements distinguish individual violations by employees from those of the governmental entity. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001). The line between official policy and independent action of employees is often elusive. *McMillan v. Johnson*, 88 F.3d 1573, 1577 (11th Cir. 1996).

A POLICY MAKER

State law determines whether a particular official has final policy making authority. *Praprotnik*, 485 U.S. at 123, 108 S.Ct. at 924. We must look to state and local law, as well as custom and usage having the force of law. *Id.* at 124 n.1, 108 S.Ct. at 924 n.1. Identifying final policy makers may be a difficult task, but state law always should direct us "to some official or body that has the responsibility for making law or setting policy in any given area of a local government''s business." *Id.* at 125, 108 S.Ct. at 925. We may

not assume that final policy making authority lies in some entity other than that in which state law places it. *Id.* at 126, 108 S.Ct. at 925. To the contrary, we must respect state and local allocation of policy making authority. *Id.* at 131, 108 S.Ct. at 928.

Two more principles guide our inquiry. First, "the authority to make municipal policy is necessarily the authority to make final policy." *Id.* at 127, 108 S.Ct. at 926. Second, the alleged policy maker must have final policy making authority with respect to the action alleged to have caused the particular constitutional or statutory violation. *Id.* at 123, 108 S.Ct. at 924; *Jett*, 491 U.S. at 737, 109 S.Ct. at 2724. An official or entity may be a final policy maker with respect to some actions but not others. *See Pembaur*, 475 U.S. at 483 n.12, 106 S.Ct. at 1300 n.12. With respect to a particular action, more than one official or body may be a final policy maker. In other words, final policy making authority may be shared. *Praprotnik*, 485 U.S. at 126, 108 S.Ct. at 925.

Our search for those responsible for setting HACEP policy leads us the Local Government Code. Section 392. 051 provides that "[t]he powers of an authority are vested in the commissioners of the authority." Tex.Loc.Gov''t Code Ann. § 392.051(b)(Vernon 1999). The authority may delegate a power or duty to an agent or employee as it considers proper. *Id.* at § 392.051(c). Therefore, the policy making authority of HACEP rests with its board of commissioners unless otherwise delegated.

Appellants' complaints of HACEP's actions can be traced to Lupe Armstrong, the Project manager. The petition alleged deliberate indifference by HACEP through its supervising personnel and Armstrong by allowing a convicted child molester on the premises. The evidence reveals that Armstrong had no authority as to whether potential tenants passed HACEP's screening process. The eligibility department determines whether a potential tenant is eligible for residency after conducting a full background check, including an

inquiry into criminal history. While Armstrong was responsible for enforcing regulations, HACEP did not delegate policy making authority to apartment managers to determine screening policy or applicant eligibility. The evidence was undisputed that Martinez was denied residency in the project. Because Appellants failed to show that Armstrong, her supervisors, or members of the eligibility department had final policy making authority, they have failed to plead a jurisdictional requisite.

DESIGNATION OF OFFICIAL POLICY

Appellants must also identify an official policy. HACEP's Admissions and Occupancy Policy is entitled "Resident Screening and Verification." It requires applicant screening, including an investigation concerning "a history of criminal activity involving drug-related activity, a pattern of alcohol abuse, crimes of physical violence to persons or property, or other criminal acts which would adversely affect the health, safety or welfare of other residents." Screening is required for applicants and appropriate members of their household. HACEP may deny an application for housing due to drug-related crimes or crimes against persons. Applicants are entitled to written notice of their eligibility determination and staff members in housing management are primarily responsible for implementing the policy.

A plaintiff may establish municipal liability under section 1983 by proving a violation of constitutional rights by an action pursuant to official municipal policy or pursuant to misconduct so pervasive among non-policy making employees of the municipality as to constitute a custom or usage with the force of law. *Monell*, 436 U.S. at 691, 98 S.Ct. 2018. Official policy is (1) a policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the law-making officers or by an official to whom the lawmakers have delegated policy-making authority; or (2) a persistent, widespread practice of officials or employees, which,

although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984). Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy making authority, and actions of officers or employees do not create liability unless they execute official policy. *Id.* Official policy involves a deliberate choice to follow a course of action made from among various alternatives by an official who is determined by state law to have the final authority to establish governmental policy. *Jane Doe A v. Special Sch. Dist. of St. Louis County*, 901 F.2d 642, 645 (8th Cir. 1990). Alternatively, "custom or usage" is demonstrated by (1) the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees; (2) deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and (3) the plaintiff's injury by acts pursuant to the governmental entity's custom. *Id.* at 646.

The standard of deliberate indifference is high. *Alton v. Texas A&M University*, 168 F.3d 196, 201 (5th Cir. 1999), *citing Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 218 (5th Cir. 1998). Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference and do not divest officials of qualified immunity. *Id.* To demonstrate deliberate indifference a plaintiff must show (1) a grave risk of harm, (2) the defendant's actual or constructive knowledge of that risk, and (3) his or her failure to take easily available measures to address the risk. *Camilo-Robles v. Hoyos*, 151 F.3d 1, 7 (1st Cir. 1998), *cert. denied, Hoyos v. Camilo-Robles*, 525 U.S. 1105, 119 S.Ct. 872, 142 L.Ed.2d 773 (1999), *citing Manarite v. City of Springfield*, 957 F.2d 953, 956 (1st Cir.), *cert. denied*, 506 U.S. 837, 113 S.Ct. 113, 121